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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of Infrastructure Sharing	)	
Provisions in the Telecommunications	)	CC Docket No. 96-237
Act of 1996	)	
	)	

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COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

The concept of infrastructure sharing, now embodied in Section 259 of the Act, was developed by USTA at a time in which rapid technological change called into question the feasibility of providing services by carriers lacking the economies of scale and scope of the larger networks operated by the Regional Bell Operating Companies (RBOCs) and GTE. Infrastructure sharing legislation was intended to codify that, even with the entry of local competitors, co-carrier relationships among providers of universal service could, and should, continue in order to advance universal service objectives. Continuation of these relationships would avoid either horn of an unacceptable dilemma: either drop carriers and customers off the network, or forestall the development of technological advances.

The Notice properly finds that Section 259-derived arrangements should be largely the product of negotiations among parties. Detailed regulations attempting to establish rules for all possible disputes that may later arise are counter-productive and should not be adopted.

There is no statutory or policy basis for attempting to reconcile Sections 251 and 259 in the ways the Notice suggests. Section 251 is a competitive provision which requires incumbent LECs to provide unbundled network elements to carriers that plan to provide service in the incumbent LEC's service area. Section 259, as a universal service section, is designed to make network infrastructure capabilities available to qualifying LECs ("QLECs") that lack economies of scale only where the QLEC plans not to compete with the providing LEC ("PLEC"). Whether a Section 259 QLEC's request is for a capability that is also available as an unbundled network element under Section 251 is not a relevant consideration in determining whether the requiremens of Section 259 are being met. And, where an agreement is negotiated under Section 259, the PLEC is not obligated to make the same terms and conditions available to parties who submit requests under Section 251.

The plain language of the statute is unambiguous as to what is and is not available under infrastructure sharing. For example, because infrastructure sharing was conceived of as a co-carrier arrangement, Section 259 does not require resale of services. The statute addresses public switched network "infrastructure, technology, information, and telecommunications facilities and functions." 47 U.S.C. § 259(a). Services are not mentioned.

Whether a particular carrier lacks economies of scale and scope, relative to the providing carrier, is an independent inquiry which does not turn on the size of the carrier's holding company or other corporate structure, but on the size of the production process used to serve a particular set of customers. Therefore, the Commission should not conclude that Section 259 is exclusively available to carriers of a particular size. Similarly, there is no adjacency requirement in Section 259, and the Commission should not impose one.

Section 259(a) does not authorize the Commission to preempt state regulation of intrastate services. Similarly, it does not deprive states of jurisdiction to resolve disputes under Section 259 that involve intrastate services.

USTA supports a rebuttable presumption that "rural telephone companies," as defined by Section 3(37) of the Act, lack economies of scale or scope. Of course, carriers not falling within the rebuttable presumption have the right to request infrastructure sharing and, if necessary, demonstrate that they too lack economies of scale or scope for the particular facilities requested.

USTA supports the tentative conclusion in the Notice that no incumbent LEC is required to develop, purchase, or install network infrastructure, technology, facilities or functions solely on the basis of a request from a qualifying carrier when the incumbent has not otherwise built or acquired and does not intend to build or acquire such elements. This rule should apply regardless of whether the requesting qualifying carrier agrees to pay the costs associated with the request.

The Commission should not issue rules establishing proxies or governing the particular prices that must be charged. The Commission can issue guidelines to the extent needed to clarify the purpose of the "fully benefit" language. That language means that the QLEC should be able to realize the cost, per-subscriber, that the PLEC enjoys because of economies of scale or scope.

Section 259(b)(3) of the Act provides in clear and unambiguous terms that providing LECs will not be treated by the Commission or any State as a common carrier for hire or as offering common carrier services with respect to any infrastructure made available. PLECs are not, by virtue of Section 259(a), rendered common carriers or subjected to any obligations to replicate precise arrangements for any other carrier.

There is also no need for pre-emptive interference by the Commission in the relationship between the parties in order to prevent service disruptions. Neither party has an incentive to cause disruption to end users' services. It would be reasonable to require that service cannot be cut off without at least sixty days notice; but additional regulation is unnecessary.

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The United States Telephone Association (USTA) respectfully submits its comments in response to the Notice of Proposed Rulemaking issued in the above-referenced docket.[1] USTA is the principal trade association of the exchange carrier industry. USTA was the progenitor of the infrastructure sharing concept, and along with the Rural Telephone Coalition (RTC), supported its inclusion in the 1996 Telecommunications Act. USTA members will be both requesting and providing carriers under Section 259.

BACKGROUND

The concept of infrastructure sharing, now embodied in Section 259 of the Act, was developed by USTA at a time in which rapid technological change called into question the feasibility of providing basic local exchange service, as well as the full range of modern services,

[1]Notice of Proposed Rulemaking, In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket 96-237, FCC 96-456 (released November 22, 1996)("Notice").

by carriers lacking the economies of scale and scope possessed by the Regional Bell Operating Companies (RBOCs) and GTE. For example, network design developments such as Line Information Database (LIDB) required significant investments in switching and database technology which were beyond the economic reach of all but the largest LECs. At the same time, use of the facilities associated with these technologies was important to providing basic local exchange, access, and operator services. The prospect of even further innovations which would be unavailable to carriers lacking economies of scale or scope encouraged the development of infrastructure sharing.

The engineering designs for addressing this problem anticipated that the much smaller networks operated by other LECs would continue to participate in the provision of service either through providing their own facilities by collectively creating economies of scale, or by "sharing" network facilities deployed by the larger carriers. Infrastructure sharing legislation, as developed by USTA and explained to Congress by USTA, the Rural Telephone Coalition, and others, was intended to codify that, even with the entry of local competitors, these co-carrier relationships could, and should, continue in order to advance the universal service objectives of the Act.[2]

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[2]In explaining the purposes of the infrastructure sharing concept, as introduced in earlier legislation, then-Senator Al Gore described the issue as follows: "not to ensure a continuation of the shared relationship among local exchange carriers would force this nation to choose one of two alternatives . . . delay evolution of the public switched network or effectively drop [certain] companies and customers off the network ...[n]either of these alternatives is acceptable." Congressional Record-Senate, June 4, 1992, S 7593, 7594 (remarks of Senator Gore introducing S2810, "Local Exchange Infrastructure Modernization Act").

USTA agrees that both the goals of promoting competition and ensuring universal service are embodied in the Act, in a complementary fashion. See Notice, para. 3. While a number of provisions of the Act, such as Sections 251 and 271, are designed to promote competition; others, such as Sections 254 and 259, preserve universal service. Consequently, the Commission should be careful not to implement Section 259, a universal service provision, under the same assumptions and with the same goals as it implemented Section 251, a local competition provision. While Section 259 was not intended to interfere with the development of local competition, that Section is explicitly foreclosed from being used by competitors of the LEC that provides the infrastructure. 47 U.S.C. § 259(b)(6). Therefore, while Sections 259 and 251 are complementary, they are separate and independent frameworks under which LECs may arrange to share facilities and network capabilities.

The Notice begins with the correct premise that Section 259-derived arrangements should be largely the product of negotiations among parties. Notice, para. 7. Since infrastructure sharing is designed to be a "win-win" situation, where providing carriers are not required to do anything which is "economically unreasonable," and infrastructure is not used to compete against the provider, there is even less need to prescribe detailed rules governing the terms of agreements between providing incumbent LECs ("PLECs"), and qualifying LECs ("QLECs"), as the Commission did in implementing Section 251[3]. Although the Commission may later be asked to resolve individual narrow disputes regarding Section 259 on a case-by-case basis, regulations

[3]See, e.g., First Report and Order, CC Docket 96-98, FCC 96-325 (August 8, 1996)("Interconnection Order").

attempting to establish rules for all possible disputes that may later arise are counter-productive.

USTA's comments below provide substantive responses and policy recommendations for the four main questions raised by the Notice: 1) what must be shared?; 2) what is the relationship of Section 251 to Section 259?; 3) who is a qualifying carrier?; 4) on what terms and conditions must infrastructure be shared?

I. What Must Be Shared?

A. Listing All Network Elements Covered by the Statutory Language is Unnecessary and Will Undermine Negotiations

There are a few guidelines which would assist parties in determining whether to proceed under Section 259 by clarifying the purpose and scope of that section. But there is no need for the Commission to undertake decisions which must be made by the parties to a negotiation. For example, there is no basis for attempting to develop an exhaustive laundry list of all items that the statutory language might cover. Any such effort by the Commission would inevitably skew negotiations, with no identifiable benefit to the parties. Moreover, as the FCC recognizes, technology will continue to evolve. Notice, para. 9.

B. The Plain Language of the Statute Establishes that Infrastructure Sharing Does Not Cover Resale of Services or Proprietary Information

The plain language of the statute is unambiguous as to what is and is not available under infrastructure sharing. For example, because infrastructure sharing was conceived of as a co-carrier arrangement, Section 259 does not require resale of services. Under infrastructure sharing, each LEC retains responsibility for service provisioning and maintenance in its service area, and maintains a direct relationship with its customers. Thus, the statute addresses public switched network "infrastructure, technology, information, and telecommunications facilities and functions." 47 U.S.C. § 259(a). Services are not mentioned.

There is no basis for fragmenting the plain statutory language in the manner described by the Commission. See Notice, para. 9. Contrary to the Notice, the Act does not distinguish between "public switched network infrastructure" and "technology, information, and telecommunications facilities and functions." See Notice, para. 31; Id., para. 28. The statute indicates no substantive distinction between these two sets of terms, nor does the Notice provide any explanation for why it apparently considers these to be distinct. The Commission should instead, adopt a more coherent reading of this section: the term "public switched network" modifies all four of the identified items: infrastructure, technology, information, and telecommunications facilities and functions. See 47 U.S.C. § 259(a).

Thus, for example, Section 259 applies only to the "public switched network information" owned by PLECs, and does not cover intellectual property or other property rights owned by others which are not part of the PLEC's infrastructure, and does not cover non-public information such as marketing information. See Notice, para. 16 (asking whether marketing information is subject to Section 259(a)). Marketing information developed by a larger LEC regarding its own customers would be of little use to a smaller LEC serving an entirely different customer base.[4] Other public information owned by the providing LEC, or infrastructure owned by the PLEC necessary for a QLEC to provide services to its customers using the shared infrastructure, technology or telecommunications facilities, would plainly fall under the scope of Section 259.

II. What is the Relationship of Section 251 to Section 259?

Sections 251 and 259 were enacted for entirely different purposes. See, e.g. Interconnection Order, para. 169 ("we conclude that the purpose and scope of Section 259 differ significantly from the purpose and scope of Section 251"). Consequently, the two Sections need not be reconciled in the ways the Notice suggests. See, e.g., Notice, paras. 10-14. Section 251, as a competitive provision, requires incumbent LECs to provide unbundled network elements to carriers that plan to provide service in the incumbent LEC's service area. By contrast, Section 259, as a universal service measure, is designed to make network infrastructure capabilities available to universal service providers that lack economies of scale or scope only where the QLEC plans not to compete. The PLEC's obligation to negotiate a sharing agreement under Section 259 is independent of whether the requested capability, or a variation thereof, is also available as an unbundled network element under Section 251.

Moreover, unlike Section 251, Section 259 permits joint ownership of the network

[4]Such information would only be of use to a competing carrier. But Section 259 is not available to competing carriers.

capabilities, should both parties choose that option. See 47 U.S.C. § 259(b)(2). Most important, unlike Section 251, any arrangement entered into under Section 259 can be exclusive. The language of Section 259 makes abundantly clear that the PLEC is under no common carrier obligation to replicate any arrangement negotiated under that section for any other QLEC, or for any non-qualifying carrier. See 47 U.S.C. § 259(b)(3).

Accordingly, the Commission should confirm the clear intent of the statute - that the provisions of Section 259 stand on their own and have no relationship with Section 251. Whether a Section 259 QLEC's request is for a capability that is also available as an unbundled network element under Section 251 is not a relevant consideration in determining whether the requirements of Section 259 are being met. And, where an agreement is negotiated pursuant to Section 259, the PLEC is not obligated to make the same terms and conditions available to parties who submit requests under Section 251.

III. Who Is A Qualifying Carrier?

A. The Criteria for Identifying Qualifying Carriers Do Not Need Regulatory Supplementation

Section 259© provides that a qualifying carrier must meet two criteria: 1) it lacks economies of scale and scope, as determined in accordance with regulations prescribed by the Commission; 2) it offers telephone exchange service, exchange access, and any other service included in universal service to all consumers without preference throughout the area for which it has been designated as universal service eligible under Section 214(e). 47 U.S.C. § 259(d).

There is no basis for adding to, modifying, expanding, or narrowing these criteria.[5]

The Notice observes that this definition would appear to apply to many small LECs, and asks whether it should therefore construe Section 259 to apply "primarily or exclusively" to cases involving small LECs. Notice, para. 12. But the fact that some carriers are benefitted does not logically lead to the conclusion that the Commission should limit eligibility to only those carriers. There is absolutely nothing in the Act or legislative history that suggests that Congress intended Section 259 to "primarily or exclusively" benefit carriers below any arbitrary size limitation. Where Congress chose to include limitations based on size, it did so explicitly. See, e.g., 47 U.S.C. § 259(f)(2). Section 259 limits eligibility not based on size, but on the lack of "economies of scale or scope." See 47 U.S.C. § 259(d)(1). Whether a carrier lacks economies of scale and scope, relative to the providing carrier, is an inquiry which does not turn on the size of the carrier's holding company or other corporate structure, but on the size of the production process used to serve a particular set of customers.

Similarly, there is no adjacency requirement in Section 259. Consequently, the Commission should not sua sponte impose one. Such a restriction would interfere with the negotiation process. As a rule, it could prove impossible to manage, as determinations of what carriers are "adjacent" to others could be arbitrary and subject to constant change as carriers expand and modify their service areas. Most infrastructure sharing arrangements will be between

[5]The Act also includes other criteria applicable to the particular arrangement negotiated under Section 259. See, e.g., 47 U.S.C. § 259(b)(6)(PLECs not required to provide infrastructure to be used by the QLEC to provide services in the PLEC's service area).

neighboring LECs, because the costs of transport will make it economically more efficient to do so. There may be many arrangements which would be "economically unreasonable" for the providing carrier because of distance and transport considerations. But not all arrangements will be economically inefficient or "economically unreasonable" because of the distance between the QLEC and PLEC. In some cases, the infrastructure, information, or technology sought to be shared will have no distance-sensitive cost component, e.g., in sharing PLEC intellectual property. Most importantly, whether a particular arrangement is desired by the carriers is an independent business decision. The Commission should not artificially cabin this discretion.

B. In Determining Whether A Carrier Qualifies for Infrastructure Sharing, Section 259 Establishes Equal Roles for the Commission and the State Commissions

The Commission notes that, under Section 259(d), whether a carrier lacks economies of scale or scope is to be determined by guidelines adopted by the Commission, while whether a carrier is designated as universal service eligible is determined by the states. From this observation, the Commission concludes that it has broad powers to regulate infrastructure sharing arrangements, while the roles of the states are limited to those specifically identified in the statute. Notice, para. 18. The Commission is half-right: the statute contemplates only limited roles for the states, those identified in the statute. But the Commission also has only a limited role, specifically identified in the statute.

Section 259(a) is not an omnibus grant of authority over intrastate services to the

Commission, only a directive to enact regulations to govern the obligations of PLECs to share facilities and functions. And Section 259(d) only governs the definition of a qualifying carrier. It is an unwarranted leap of logic for the Commission to conclude that because it is to prescribe regulations to determine when a carrier lacks economies of scale or scope, it must also have authority over intrastate services (or disputes associated with the provisions of such services). See Notice, para. 17.

Just as the Eighth Circuit has suggested with respect to Section 251, Section 259 does not eliminate Section 2(b) from the Act, nor does it provide explicit and unambiguous authority over intrastate services. See 47 U.S.C. § 152(b). As discussed above, PLECs are not required to offer services for resale to QLECs under Section 259. Thus, Section 259 does not give the Commission authority over the intrastate services of PLECs. Section 259 does permit a QLEC to obtain infrastructure under Section 259 for the purpose of offering intrastate services. But the services offered by a QLEC using that infrastructure are not regulated by Section 259. Rather, intrastate services provided using shared infrastructure will continue to be regulated by the state commissions - just as if they were provided by the QLEC using its own facilities.

Thus, the implications of Section 259(d) for who should resolve Section 259 disputes are that the proper jurisdiction for resolving a dispute depends on the jurisdictional nature of the service to be provided using the facilities, technology or information to be shared. If the infrastructure is to be used for intrastate services, then the dispute should be resolved by the state commission of the providing LEC; if it is used for interstate services, by the Commission.[6] Where infrastructure is sought to be used for both types of services, the parties appear to have a choice of forum, as indicated by the use of the word "or" in Section 259(b)(7).

The Notice asks whether the Commission has authority to preempt state regulation under Louisiana PSC, in the event that Section 259 does not apply to intrastate services. Notice, para. 18; see Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986) ("Louisiana PSC"). Whether preemption is justified will depend on the specific facts and circumstances involved, and whether they meet the test of Louisiana PSC.

The Notice seeks comment on whether it should impose Section 259(a) requirements on incumbent LECs who have not "requested" a universal service designation. (Some incumbent LECs may simply be designated as eligible by a state commission, without having made any request. See Notice, para. 19 (discussing language of Section 259(a)). The universal service goals of Section 259 would be best served by determining that Section 259 obligations apply to a PLEC who receives a request from any carrier who meets the definitional criteria in Section 259(d). Section 259(d), the specific section for determining whether a carrier is qualified to share with a PLEC, does not include the "requested and obtained designation" language

[6]The Notice seeks comment on the filing of infrastructure sharing agreements under Section 259(b)(7). Notice, para. 28. As with the dispute resolution framework discussed above, if an agreement is for facilities to be used for intrastate services, the agreement should be filed with the state commission; if for interstate services, with the Commission (there is no "appropriate state commission" in that case).

contained in Section 259(a). Since the specific language of Section 259(d) applicable to this issue should control over the more general language in Section 259(a), infrastructure sharing must be made available to any carrier designated as universal service eligible pursuant to Section 214(e), regardless of whether that carrier submitted a request for designation.

C. The Commission Should Establish a Rebuttable Presumption That LECs Who Meet the Act's Definition of a "Rural Telephone Company" Lack Economies of Scale or Scope

The Notice seeks comment on whether there are classes of carriers that would per se qualify as lacking economies of scale or scope, suggesting that a carrier may so qualify if its operations are within the limitations on service area and access lines set forth in the definition of "rural telephone company" in Section 3(37) of the Act. See 47 U.S.C. § 153(37). Notice, para. 37. USTA supports this position, and believes it is an effective way to further the purposes of Section 259. Of course, carriers not falling within the scope of the rebuttable presumption have the right to request infrastructure sharing and, if necessary, demonstrate that they lack economies of scale or scope for the particular facilities requested.[7]

The Commission defines "economies of scale" as being present where a lower unit cost of production can be achieved by a production process that is designed to produce a larger total

[7] Thus, the Commission is correct to note that a carrier could lack economies of scale or scope for only some facilities, but have economies of scale or scope for others. Notice, para. 37. As the "economies" at issue are always relative, there may be certain facilities which can only be deployed on a cost-effective basis by an operating entity of 10 million lines or more. A 5 million line LEC operating entity should be eligible to submit a Section 259 request in that case.

quantity of a particular product or service; economies of scope are also defined in the Notice with reference to a comparison between the relative efficiencies of a joint production process and a separate process. Notice, para. 37. Thus "economies of scale and scope" are relative conditions that likely exist to varying degrees for all LECs, including small rural telephone companies. For many infrastructure arrangements, large LECs will likely experience relatively greater economies of scale or scope than much smaller LECs.[8] Thus, it is reasonable to presume that, relative to the largest LECs, those operating entities who meet the Act's definition of a "rural telephone company" lack economies of scope and scale.[9]

Finally, establishing such a rebuttable presumption will avoid the administrative burdens associated with making a fact-specific, company-specific demonstration as to the lack of economies of scope and scale. Such a rebuttable presumption would therefore serve the public interest by reducing the cost and uncertainty for carriers seeking to obtain infrastructure sharing, and thereby reduce the cost to consumers of those carriers, as well as speed the deployment of advanced services to those consumers.

The Notice asks whether the analysis of whether a carrier lacks economies of scale or

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[8]This is not necessarily so in every case. A very efficient small LEC could reach greater economies of scale at a smaller output and lower average unit cost than a larger firm operating inefficiently.

[9] For example, the Commission could note that, relative to the largest LEC networks, the rural LEC operating entities generally have higher unit costs of production because their network is designed to produce a smaller total quantity of products and services, and therefore lack economies of scale to the extent that these economies exist for these network capabilities.

scope should be measured at the holding company level. Notice, para. 37. It should not. The definition of "rural telephone company" assesses whether a particular "operating entity" is rural. See 47 U.S.C. § 153(37). The Commission should follow the approach of Congress and assess whether a carrier lacks economies of scale or scope at the "operating entity" level. Congress adopted this approach recognizing that simply because an operating entity is part of a larger holding company structure, that does not always translate into the economies of scale required to support advanced network capabilities. An investment in a $10 million dollar facility for the use of 1000 customers is no more economic if undertaken by a larger corporate concern. As a matter of economic principles, whether "economies of scale or scope" are lacking is a question to be examined from analyzing the size of the production process used to serve a particular set of customers, not the holding company that may own that process.

In its Regulatory Flexibility Analysis, the Commission notes that the definition of qualifying carrier is "dependent on the Commission's decisions in the universal service proceeding." Notice, para. 48. This is true only insofar as the universal service Order will adopt rules for use in determining how a carrier qualifies under Section 214(e). But the Commission is required by statute to issue an Order implementing Section 259 by February 8, 1997. See 47 U.S.C. § 259(a). A universal service Order is not expected until after that date. Also, the Commission's Notice correctly observes that it need not address the universal service definition in this proceeding, Notice, para. 38, nor must carriers await the outcome of the universal service docket if they have already been subjected to carrier of last resort obligations by the state in which they operate. Thus, carriers need not await the outcome of the universal service proceeding to begin negotiating Section 259 agreements.

IV. On What Terms and Conditions Must Infrastructure Be Shared?

A. The Commission Should Adopt A Few General Guidelines Which Define the Circumstances Under Which Sharing Is "Economically Unreasonable or Not In the Public Interest"

The Notice seeks comment on how to determine whether an action is "economically unreasonable or not in the public interest." Notice, para. 20; see 47 U.S.C. § 259(b)(1). Generally, this question is one which will be resolved by the parties to an infrastructure sharing arrangement. Overly detailed standards established in Commission rules could frustrate this type of negotiated resolution.

Nonetheless, there are certain exemplary situations which could be established by the Commission. For example, USTA supports the tentative conclusion in the Notice that no incumbent LEC is required to develop, purchase, or install network infrastructure, technology, facilities or functions solely on the basis of a request from a qualifying carrier when the incumbent has not otherwise built or acquired and does not intend to build or acquire such elements. Notice, para. 20.

This rule should apply regardless of whether the requesting qualifying carrier agrees to pay the costs associated with the request. See Id. Requiring the PLEC to purchase, install, or upgrade facilities in response to a request would effectively constitute mandatory joint network planning, contrary to Section 259. See 47 U.S.C. § 259(b)(2) (Commission regulations shall "permit, but shall not require, the joint ownership or operation of public switched network infrastructure").

Interpreting the "economically unreasonable" or "contrary to the public interest" standard in this way is unlikely to yield any change in outcome. The "costs associated with the request" would reasonably include the costs of developing, purchasing, and/or installing the infrastructure in question, including the opportunity costs of labor and other resources diverted to fulfilling the request, and to maintaining and administering the arrangement. In such circumstances, it is unlikely that qualifying carriers will find it beneficial to pay another carrier to incur such costs as opposed to incurring such costs itself.[10] However, the diversion of labor and other resources to fulfilling the request could undermine a PLEC's ability to provide services to its own end user customers. This would not serve the public interest, and would be contrary to Section 259(b)(1).

A few other guidelines might also be helpful to the parties negotiating an infrastructure sharing arrangement. Incumbent LECs should not be required to provide infrastructure under Section 259 in a manner which effectively results in the infrastructure being used to compete against the providing LEC. For example, where the qualifying carrier obtains infrastructure under Section 259, develops and offers services, neither the QLEC or any carrier obtaining

[10] Alternatively, if these costs are excluded, that arrangement would be per se economically unreasonable. Moreover, as a matter of policy, the public interest is best served by encouraging each carrier to invest in its own network. Distorting these incentives would be contrary to the public interest. Thus, such a rule would also not meet the requirements of Section 259(b)(1).

services or functions which utilize the shared infrastructure from the QLEC should be able to use the providing carrier's infrastructure to compete in the PLEC's service area.

Such a result would create a large loophole and eliminate the effectiveness of Section 259(b)(6), contrary to the public interest as identified by Congress. Moreover, infrastructure acquired from other carriers is not within the scope of the network facilities required to be provided under Section 251 - Section 251 only obligates LECs to provide access to their own facilities. See, e.g. 47 U.S.C. § 251(c)(1)(2) (LEC has a duty to provide interconnection "with the local exchange carrier's network.")(emphasis added). Consequently, the Commission should provide that services or facilities obtained by a QLEC pursuant to Section 259 are not available under Section 251 for purposes of competing against the providing PLEC. Alternatively, the Commission could state that providing carriers are not required to share, or continue sharing, in such circumstances.

Finally, Section 259(b)(1) specifies that a providing LEC is not required to "take any action" which is economically unreasonable or contrary to the public interest. Requiring a LEC to continue providing infrastructure sharing even if it becomes economically unreasonable, in order to continue service to subscribers, is therefore precluded by the statutory language. 47 U.S.C. § 259(b)(1). However, noting the valid concern regarding service disruptions, Notice, para. 27, USTA believes that the Commission could require a minimum of 60 days notice prior to discontinuing any infrastructure sharing arrangement.

B. The Commission Should Interpret The Act's Requirement That The Qualifying LECs "Fully Benefit" From the Economies of Scale and Scope In a Manner Which Reflects the Effects of Costs on the Prices Charged to American Consumers

The Notice seeks comment on the requirement of Section 259(b)(4) that the Commission adopt regulations to ensure that providing LECs make infrastructure available on just and reasonable terms and conditions that permit QLECs to "fully benefit" from the economies of scale and scope of the providing carrier. The Notice asks whether the "fully benefit" language necessarily implicates questions about pricing, and whether Section 259 confers authority for the Commission to issue guidelines to govern the prices of infrastructure provided under this Section. Notice, para. 23.

As noted before, detailed rules inherently undermine negotiations by eliminating options for the parties. Detailed rules, including establishing particular prices or pricing methodologies, necessarily interfere with the negotiation process and require extensive Commission oversight and involvement. As infrastructure sharing is envisioned as a mutually beneficial arrangement, the provisions of Section 259 are designed to permit negotiations to be largely unconstrained. Accordingly, the Commission should not attempt to issue rules establishing proxies or governing the particular prices that must be charged. Nor should the Commission establish any guidelines other than those necessary to articulate the "fully benefit" language. Specifically, it would be sufficient for the Commission to establish a rule codifying Section 259(b)(4), to provide text in the Order explaining the purpose of the "fully benefit" language, and to issue guidelines to the extent needed.

Any such guidelines should recognize the following principles. As discussed above, the purpose of infrastructure sharing is to recognize that advances in network technology are often unaffordable to many LECs who lack economies of scale or scope in a particular serving area. LECs who are subject to universal service obligations must make network investments to provide services in areas where the customers served by that LEC cannot afford their pro rata share of the network costs. Infrastructure sharing is intended to permit these investments without assessing an uneconomic burden on the qualifying LEC, and thus on the qualifying LECs' subscribers. Section 259(b)(4) therefore requires that the qualifying LEC obtain infrastructure on terms and conditions which enable it to "fully benefit" from the economies of scale and scope of the providing LEC.

The point of this requirement can perhaps best be explained through a hypothetical example: a particular network facility costs $10 million dollars to purchase, install and operate, regardless of the number of customers served. This example of "cost," of course, includes a cost of capital, and an appropriate share of costs which are joint and common with respect to other network facilities and operations, such as the labor required to install and operate the facility. Ignoring for the moment issues such as depreciation, and assuming no subsidies between access and local customers, this network facility would therefore require revenue of $1 per customer for a 10 million line company. Such a price is not likely to impose such a burden that customers drop off the network.